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Stop Regulating Government Paperwork With More Government Paperwork

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STOP REGULATING GOVERNMENT
PAPERWORK WITH MORE GOVERNMENT
PAPERWORK

Joseph D. Condon*

The Paperwork Reduction Act (PRA) is an often-ignored law with a large impact. Federal agencies cannot ask the same questions of more than nine people or entities without submitting a proposed information collection to the White House Office of Management and Budget for review, a process that can take up to a year to complete. In an attempt to regulate the amount of paperwork foisted on the public, the PRA has created an enormous amount of paperwork for federal agencies—without any meaningful reduction in the paperwork burden faced by the public. Yet, likely because the burden of the PRA is borne primarily within agencies themselves, this law has gone relatively understudied by legal academics. This note considers the PRA—its history, purpose, functions, benefits and costs—and concludes that the PRA should be largely eliminated.

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INTRODUCTION

The Paperwork Reduction Act (PRA) has the sort of name that anyone can get behind. No one likes paperwork. We should have less of it. The PRA goes about this goal by requiring agencies to run through an approval process for any information collection that involves asking more than nine people the same set of questions.¹ Agencies submit a package to the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget with a justification and estimate of the public burden.² OIRA considers the proposal along with submitted public comments, and either rejects the request or approves it for up to three years.³

This process is intended to force agencies to think carefully about the burdens they impose on the public in the form of surveys, reporting requirements, and the like.⁴ It centralizes approval to discourage duplicative paperwork across agencies. The intended effect is to reduce the paperwork burden on the public.⁵

Unfortunately, the PRA has not had this effect. In its thirty-seven years in existence, the paperwork burden imposed on the American public has grown substantially.⁶ The causes of this growth—a growing population, increased economic activity, new information burdens established by Congress—are well beyond the reach of the agencies constrained by the PRA.⁷ As this Note will argue, the benefits that are associated with the PRA are minimal and largely secondary effects of the review process—not the significant constraint on government paperwork that its drafters imagined.

1. 44 U.S.C. § 3502(3)(A)(i) (2017).

2. 44 U.S.C. §§ 3503-3504, 3506-3507 (2017).

3. *Id.*

4. 44 U.S.C. § 3501 (2017).

5. *Id.*

6. See OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. AND REG. AFFAIRS, 2016 INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 2 (showing an increasing paperwork burden between FY2004 and FY2015).

7. *E.g.*, discussion of tax return lobbying *infra* Section I.A.

The PRA has introduced a significant paperwork burden on federal agencies. The process of developing and submitting a package to OIRA can take six months to a year.⁸ In my experience as a former government researcher, I worked on projects involving PRA surveys that stretched out over several years to comply with the OIRA approval process for sampled surveys.⁹ I also worked on projects that, although they would have been substantially improved through the use of a survey, relied instead on individual and anecdotal interviews to draw conclusions.¹⁰ This delay, although purposeful, forces agencies to forgo useful information collection, delay actions that would support useful rulemaking, and inhibit program improvements that would meaningfully improve government functioning.

This note will proceed in three parts. Part I considers the background of the PRA. This includes the burden of paperwork and administrative reporting on the public, the government need for data and information collection, and a brief history of the legislation that has developed into the modern PRA. Part II discusses the operation and effects of the PRA. After developing a working understanding of the functioning of the PRA review process, this Part discusses the benefits and burdens of the law as it currently functions with respect to agencies and the public. I conclude that the costs of the PRA outweigh the benefits. Finally, Part III considers proposals for reform, and recommends largely eliminating the PRA.

I. WHY REGULATE PAPERWORK?

Necessary though it may be, paperwork is a drag. It is a transaction cost and a deadweight loss: something inherently inefficient.¹¹ Generally speaking, people do not enjoy or value filling out paperwork.¹²

Nevertheless, information collection is one of the core functions of government.¹³ This information collection frequently takes the form of paperwork: re-

8. Estimates of delay vary. Based on the timeframes included in statute, PRA approval adds four months to a collection. See 44 U.S.C. § 3506 (2017). However, this does not include required review internal to an agency or time spent preparing a package for review by OIRA. One study involving interviews with a range of federal researchers put average delay at six to nine months. STUART SHAPIRO, *THE PAPERWORK REDUCTION ACT: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM* 51 (2012). The rule of thumb in the author's former agency was to add a year to a project schedule to incorporate agency and OIRA approval of a statistical survey.

9. Author's personal experience working in a federal agency.

10. Author's personal experience working in a federal agency.

11. See Elizabeth F. Emens, *Admin*, 103 GEO. L. J. 1409, 1419-20 (2015); see also Cost, BLACK'S LAW DICTIONARY (11th ed. 2019).

12. See Emens, *supra* note 11, at 1420. This is especially true if the ultimate goal of that paperwork is to facilitate the regulation of your business. See, e.g., *A. O. Smith Corp. v. Fed. Trade Comm'n*, 530 F.2d 515, 528 (3d Cir. 1976) (though the court denied an injunction, it acknowledged that "[a]ny time a corporation complies with a government regulation that requires corporation action, [the corporation] spends money and loses profits").

quests for information directed at members of the public. Many of the public's interactions with government involve paperwork: filing taxes, applying for licenses, filling out Census forms, et cetera. For industry, one of the core forms of government regulation is a myriad of reporting requirements.

It should come as no surprise, then, that elected officials have worked hard to constrain, control, and eliminate paperwork, or "red tape."¹⁴ It is the rare lobby requesting an additional paperwork requirement for their constituency. Multiple Presidents have emphasized eliminating paperwork as a goal of their administration.¹⁵ Congress has also attempted to legislatively regulate government paperwork. Most notably, in 1980 Congress passed the Paperwork Reduction Act (PRA), and has revised it three times since.¹⁶

The PRA attempts to regulate paperwork with additional paperwork. The PRA created a new bureaucratic organ, the Office of Information and Regulatory Affairs (OIRA),¹⁷ and established a process through which agencies seek OIRA clearance before submitting a request for information.¹⁸ This process is intended to force agencies to consider the costs of their information requests and provide for centralized coordination between agencies.¹⁹ The PRA framework was developed in response to a history of constituent frustration with government paperwork driving political action.²⁰

This Part will provide some background on federal government paperwork: its costs, its benefits, and a brief history of attempts to regulate it.

A. *The Burden of Government Paperwork*

Americans spend a great deal of time filling out paperwork from a variety of sources—much of it from corporations and not-for-profits we do business with, and another significant portion of it from state and local governments. Much of that time and effort (that is to say, the cost of paperwork) is not well document-

13. See, e.g., U.S. CONST. art. 1, § 2 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."); see also William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. LEGIS. 1, 2 (1987) ("The eleventh law passed by the First Congress of the United States imposed a paperwork requirement, the documentation of marine vessels.")

14. See Funk, *supra* note 13, at 26-30.

15. See generally *id.*

16. 44 U.S.C. §§ 3501-3520 (2017).

17. 44 U.S.C. § 3503 (2017).

18. See 44 U.S.C. § 3506 (2017).

19. See Funk, *supra* note 13, at 33-34.

20. See *id.* at 13-14.

ed.²¹ Professor Richard Thaler has characterized the government-related portion of this administrative work as “sludge,” or obstacles that diminish the effectiveness of programs by erecting barriers to participation.²²

The burden of paperwork on citizens is not distributed evenly. Professor Elizabeth Emens notes that burdens of personal paperwork vary by socioeconomic status and gender.²³ Poor people face a disproportionate paperwork burden, as most governmental assistance programs have onerous paperwork requirements.²⁴ Individuals with means have better access to outsource this type of labor.²⁵ Professor Emens notes that marginalized groups tend to face higher administrative costs, such as the burdens placed on transgender individuals who seek government recognition of their identity,²⁶ or burdens faced by same-sex married couples prior to *Obergefell v. Hodges*.²⁷

The PRA, however, requires estimation of the burdens imposed by federal information collection.²⁸ Historically, this cost is measured as “burden hours.”²⁹ The Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), estimated the total burden of federal paperwork in the 2015 fiscal year at 9.78 billion hours—an increase of 350 million hours from the

21. See Emens, *supra* note 11, at 1414-15 (explaining how the federal government uniquely tracks administrative cost as opposed to other sectors of society).

22. Richard H. Thaler, *Nudge, Not Sludge*, 361 SCIENCE 431 (2018).

23. Emens, *supra* note 11, at 1427, 1440-43.

24. See KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 2 (2015) (“One way the poor pay for government aid is with their time.”).

25. Emens, *supra* note 11, at 1427-28.

26. *Id.* at 1413.

27. 135 S. Ct. 2584 (2015) (holding that same sex marriage is constitutional).

28. See 44 U.S.C. § 3506(c)(1)(A)(iv) (2012) (requiring agency heads to include “a specific, objectively supported estimate of burden” in proposals to OMB); 44 U.S.C. § 3502(2) (2012) (“the term ‘burden’ means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency”).

29. Funk, *supra* note 13, at 22-23.

prior year.³⁰ This burden is felt by businesses, nonprofits, individuals, and households.³¹

The total economic cost of federal government paperwork, including equipment, recordkeeping, labor, and opportunity cost, is not as well documented. For instance, as noted by Professor Adam Samaha, while government monetization of lives saved is commonplace for purposes of cost-benefit analysis, the monetization of information collection burden occurs sporadically and without specific guidance from OMB.³² Since the 1980s, the Federal Government has applied cost-benefit analyses to new rulemakings and regulations, such that new rulemakings are almost certainly cost-beneficial.³³ Information collections, however, do not have to pass a similar economic test. For instance, the IRS estimates the total burden of the 1040 individual income tax form is 1.97 billion hours (thereby accounting for nearly a fifth of the entire federal paperwork burden).³⁴ However, the IRS only provides estimates of the financial cost of tax preparation, such as the costs of recordkeeping, tax preparation software, accounting services and the like; it does not monetize this estimate of burden hours.³⁵

Tax preparation also provides an opportunity to consider the source of some federal government paperwork burden. Some federal paperwork burden comes from poorly thought-out forms or ineffective recordkeeping systems in the federal government—the sort of thing the PRA is designed to address.³⁶ But much federal information collection is driven by Congressional mandate, and there are reasons beyond mere administrative sloth that those systems remain burdensome. Some interests benefit from federal burdens, and Congress is sometimes willing to coop-

30. OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, *supra* note 6, at i. Because this statistic is published in connection with the PRA, it excludes paperwork generated by agencies not covered by the PRA. For comparison, Americans worked around 285 billion hours in 2016. Author's calculation; U.S. BUREAU OF LABOR STATISTICS, Table B-2, <https://www.bls.gov/news.release/empsit.t18.htm> (last visited Jan. 10, 2020) (average weekly hours and overtime of all employees on private nonfarm payrolls by industry sector, seasonally adjusted); Average Weekly Hours, retrieved from ECONOMIC RESEARCH, FEDERAL RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/AWHAETP> (last visited Nov. 11, 2018); U.S. Bureau of Labor Statistics, Civilian Labor Force, retrieved from FRED, FEDERAL RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/CLF16OV> (last visited Nov. 11, 2018).

31. See 44 U.S.C. § 3501(1) (2012). One study found that approximately 21% of information collection requests implicated individuals and households. See Emens, *supra* note 11, at 1464 n. 235 (2015).

32. Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L. J. 279 (2015).

33. See generally CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 3-26 (2018) (describing what Professor Sunstein characterizes as a “revolution” in the application of cost-benefit analysis to policymaking).

34. INTERNAL REVENUE SERV., SUPPORTING STATEMENT U.S. INDIVIDUAL INCOME TAX RETURN, OMB Control No. 1545-0074 (2018), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=85809800>.

35. See Samaha, *supra* note 32, at 295.

36. See discussion of the operation of the PRA, *infra* Section II.A.

erate. For example, a substantial and winning lobbying effort by members of the tax preparation industry has encouraged Congress to slow or prevent changes that would reduce the burden associated with filing personal income tax returns.³⁷

B. Government Information Collection Needs

Paperwork is a means to an end.³⁸ Although some paperwork may lack inherent benefits, it generates critical secondary benefits.³⁹ The regulation and organization of society and industry requires that the government know something about what it seeks to regulate. Indeed, the information needs of governments have shaped fundamental aspects of our society.⁴⁰

In the case of federal information collection, a great deal is required by statute or, in the case of the Census, the Constitution. Federal agencies have a good deal of discretion regarding the design of information requests, such as whether to use electronic forms or which populations to target, that impact the overall burden of the collection. However, they are ultimately constrained by the dictates of Congress, so many burdens are unavoidable.⁴¹

Federal information collection takes many forms. The PRA defines the “collection of information” as “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency.”⁴² Perhaps most notably, the decennial census and other information collections conducted by the Census Bureau make up a significant portion of statistical collection by the federal government. Many other agencies conduct research or statistical reporting that requires information collection from the public. As noted above, tax collection represents an enormous portion of total federal paperwork.⁴³ Applications for government assistance, such as the Free Application for Federal Student Aid (FAFSA), are covered by the PRA.⁴⁴ Many agencies, such as the U.S.

37. See Libby Watson, *How Big-Money Lobbying is Making Tax Day Even More Complicated*, SUNLIGHT FOUNDATION (Apr. 13, 2016), <https://sunlightfoundation.com/2016/04/13/how-big-money-lobbying-is-making-tax-day-even-more-complicated/>.

38. See Emens, *supra* note 11, at 1420.

39. For instance, the Census provides data used in innumerable research studies, in addition to supporting basic government functions.

40. See, e.g., JAMES C. SCOTT, *SEEING LIKE A STATE* 64-71 (1998) (describing state need to develop surnames of individuals for purposes of tax collection schemes, among others in 13th century England, 4th century China and 17th century Tuscany).

41. See OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, *supra* note 6, at 2 n.8, 2-6 (discussing that most of the burden hours fall within the agency, but most of the increases in burden hours are not due to agency discretion); see also Samaha, *supra* note 32, at 314 n.154.

42. 44 U.S.C. § 3502(3) (2017).

43. See, e.g., 83 Fed. Reg. 51565 (Oct 11, 2018) (notice to public regarding Department of Treasury’s submission to OMB for review and clearance in accordance with PRA).

44. E.g., U.S. Dep’t of Educ., *Free Application for Federal Student Aid* 2 (2018), <https://fafsa.ed.gov/fofw1819/pdf/PdfFafsa18-19.pdf>.

Department of Transportation, maintain licensing and registration databases that require information collection.⁴⁵ Additionally, the federal government requires applications and data collection when administering a wide variety of grant programs.⁴⁶ Information used to support the evaluation of government programs, such as customer experience surveys and the like, is often covered.⁴⁷

Naturally, information collection includes survey research, which can be used to inform rulemaking, the cost-benefit analysis used to support rulemaking, or governance goals such as program evaluation or strategic planning.⁴⁸ The requirements of the PRA can also apply to any required exchanges of information between private parties (such as food labeling) and recordkeeping requirements of private parties (such as workplace incident reports).⁴⁹

C. *A Brief History of Paperwork Regulation*

The federal government's attempts to restrain its imposition of paperwork date back over eighty years. In 1938, President Franklin Roosevelt ordered a study from the Central Statistical Board on the volume of statistical reports requested by the federal government from businesses.⁵⁰ In part because of the recommendations of this study, and because of the growing burdens of information collection generated by the wartime government,⁵¹ Congress passed the Federal Reports Act of 1942.⁵² This bill formed the basis of what would later become the Paperwork Reduction Act.

The Federal Reports Act placed the burden on agencies to reduce the burdens they imposed on the public through information collection.⁵³ The Federal Reports Act positioned the Bureau of the Budget (BoB), the predecessor to the modern

45. See, e.g., Dep't of Transp., Unified Registration System, Federal Motor Carrier Safety Admin. (2019), <https://www.fmcsa.dot.gov/registration> (discussing submission of personal information for registration purposes).

46. See NATALIE KEEGAN, FEDERAL GRANT FINANCIAL REPORTING REQUIREMENTS AND DATABASES FREQUENTLY ASKED QUESTIONS, CONG. RESEARCH SERV. 2 (2016) ("[F]ederal agencies that administer federal grant programs must collect and report financial grant data to federal grant databases").

47. See, e.g., U.S. DEP'T OF AGRIC., NATIONAL APPEALS DIVISION CUSTOMER SERVICE SURVEY, OMB Control No. 0503-0007, October 31, 2017, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-0503-002.

48. See, e.g., FED. AVIATION ADMIN., GENERAL AVIATION AND PART 135 ACTIVITY SURVEY SUPPORTING STATEMENT A, OMB Control Number 2120-0060 (May 24, 2018), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=83338601>.

49. See 44 U.S.C. § 3502(3)(A) (2012); Samaha, *supra* note 32, at 286.

50. See Funk, *supra* note 13, at 7-8.

51. See *id.* at 8.

52. See Pub. L. No. 77-831, 56 Stat. 1078 (1942) (codified as amended at 44 U.S.C. §§ 3501-3520 (2012)).

53. See Funk, *supra* note 13, at 10.

OMB,⁵⁴ as a central check on agency information collection.⁵⁵ As in the modern regime, all information collections, defined as identical requests for information required of 10 or more individuals, required approval from BoB.⁵⁶ This included both statutorily required information collection and collections where participation was voluntary. Significantly, the Federal Reports Act exempted a wider swath of agencies from review than later legislation.⁵⁷

Over time, however, the paperwork-filing public complained that the Federal Reports Act was ineffective at reducing the burden of federal paperwork.⁵⁸ In particular, business groups raised concerns regarding information requests from the FTC that would have required significant changes to recordkeeping practices.⁵⁹ Companies attempted to challenge agencies in court over their adherence to the Federal Reports Act, but were largely unsuccessful.⁶⁰

Constituent complaints about government paperwork brought two reforms in the 1970s.⁶¹ The first was the concept of the “Information Collection Budget,” where agencies were encouraged to adhere to a limited number of information collections. President Gerald Ford set goals for reducing the number of reports that the federal government required of businesses. His effort was successful in reducing total reports, but was accompanied by an increase in burden hours.⁶² Focus then shifted to burden hours. In a 1979 Executive Order, President Carter formally adopted the Information Collection Budget, which tasked each agency with developing a budget for information collection burden hours.⁶³ OMB was to conduct annual reviews of information collection requests, with the goal of capping and reducing the burden imposed by government paperwork.⁶⁴

The second reform was a national Commission on Paperwork.⁶⁵ The resulting Commission report, released in 1977,⁶⁶ provided the impetus for congressional action to update the Federal Reports Act. The ensuing legislation was the Paperwork

54. See Exec. Order 11,541, 3 C.F.R. 939 (1966-1970) (delegating power from the BoB to OMB).

55. See Funk, *supra* note 13, at 8.

56. 44 U.S.C. §§ 3501-3520 (2017).

57. See *id.* (exempting the Treasury and other financial agencies from review).

58. See Funk, *supra* note 13, at 14-15.

59. See *id.* at 17-18.

60. See *id.* at 18-20.

61. See *id.* at 20, 23.

62. See *id.* at 24.

63. Exec. Order 12,174, 49 Fed. Reg. 69,609 (Dec. 4, 1979).

64. See Funk, *supra* note 13, at 23-25. This system remains in place today, despite not being codified in statute. See *id.*

65. See Funk, *supra* note 13, at 21. Created by Congress via Pub. L. No. 93-556, 88 Stat. 1789 (1974).

66. COMM'N OF FED. PAPERWORK, FINAL SUMMARY REPORT (Oct. 3, 1977).

Reduction Act of 1980.⁶⁷ The PRA created the OIRA within OMB to centralize control of information collection.⁶⁸ It significantly increased the range of agencies subject to OMB review, both by bringing the IRS and other financial agencies within OMB's ambit⁶⁹ and by expanding the definition of information collection.⁷⁰ The PRA also added a public protection provision that exempted the public from penalties for failure to respond to expired or non-cleared requests,⁷¹ and added statutory deadlines for agencies to bring existing regulations into compliance.⁷²

By the early 1990s, the cycle had repeated itself. The business community again complained of an overabundance of government paperwork.⁷³ In 1995, Congress responded with an updated Paperwork Reduction Act.⁷⁴ The revamped Act, a completely reenacted version of the legislation, once again expanded the definition of both information and collection.⁷⁵ The legislation also strengthened the clearance process by empowering OIRA with more criteria on which to approve or disapprove collections, and increased the information that agencies must supply with proposed collections.⁷⁶

The most recent statutory change to the PRA was the Information Quality Act (IQA), enacted in 2001.⁷⁷ The IQA was a small addendum to a consolidated appropriations bill that directed OMB to develop standards for statistical information used, collected and distributed by the federal government.⁷⁸ The provision was met with concern by those who viewed it as designed to hinder environmental rulemaking, eliciting worries that it would create more opportunities to challenge

67. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501-3520 (2012)).

68. 44 U.S.C. § 3504(a)(C)(2) (2017).

69. Funk, *supra* note 13, at 31, 36.

70. Compare Pub. L. No. 77-831 § 5, 56 Stat. 1078 at 1079 (1942) (codified as amended at 44 U.S.C. §§ 3501-3520 (2012)), with 44 U.S.C. § 3502(3) (2012) (defining "collection of information."); See also Funk, *supra* note 13, at 31-32.

71. 44 U.S.C. § 3512 (2017).

72. Pub. L. No. 96-511, 94 Stat. 2818 (1980).

73. Jeffrey S. Lubbers, *Recent Developments: Regulatory Reform & The 104th Congress: Paperwork Redux: The (Stronger) Paperwork Reduction Act Of 1995*, 49 ADMIN. L. REV. 111, 113 (1997).

74. Pub. L. 104-13, 109 Stat. 176 (1995) (codified as amended at 44 U.S.C. §§ 3501-3520 (2012)).

75. Lubbers, *supra* note 73, at 118-19.

76. See *id.* at 117.

77. Pub. L. No. 106-554 § 515, 114 Stat. 2763A-153-54 (2001).

78. *Id.*

government action.⁷⁹ While OMB has issued guidelines on data quality, the overall impact of the provision is not yet clear.⁸⁰

II. THE OPERATION AND EFFECTS OF THE PAPERWORK REDUCTION ACT

The central irony of the PRA is that it seeks to reduce the burden of paperwork on the public by imposing the burden of paperwork on federal agencies. This Part will discuss 1) the operation and function of the PRA, 2) the effectiveness of the PRA at reducing public paperwork burden, and 3) the effects of the PRA on agency operations.

A. *The Operation of the Paperwork Reduction Act*

At its core, the PRA requires notice and comment and OMB approval for “information collections” conducted by covered agencies.⁸¹

1. Agencies and Information Collections Covered

As discussed above, the number of agencies covered by the PRA has grown over time.⁸² Today, the PRA covers every executive agency, military department, government corporation or government-controlled corporation, and independent regulatory agency, with four exceptions: the General Accounting Office (GAO), the Federal Election Commission (FEC), the governments of the District of Columbia and other federal territories and possessions, and government-owned contractor-operated facilities such as national laboratories.⁸³ The requirements of the PRA apply even to agencies that are not covered by OIRA review of cost-benefit analysis.⁸⁴ Independent regulatory agencies do, however, retain the power to reject a disapproval by the OMB director by majority vote.⁸⁵

79. Tammy P. Tideswell, *The Information Quality Act: An Environmental Primer*, 51 NAVAL L. REV. 91-92 (2005).

80. *Id.* at 96-97. Since the IQA's adoption in 2001, there has been only one study of its effects on federal rulemaking, whose results were inconclusive but whose prognosis was that it would hinder or discourage rulemaking where agencies did not wish to subject themselves to IQA scrutiny. *Id.* at 97.

81. See 44 U.S.C. §§ 3501, 3506-3508 (2017).

82. See discussion *supra* Section II.C.

83. 44 U.S.C. § 3502(1) (2017).

84. Exec. Order No. 12866, 58 Fed. Reg. 51,735 “Regulatory Planning and Review” at § 3(b) (Sept. 30, 1993). Because of the PRA, then, a rulemaking that is otherwise exempt from OIRA benefit-cost review but requires information collection as defined by the PRA and its attendant regulations must still receive OMB clearance.

85. 44 U.S.C. § 3507(f). After extensive research, the author has been unable to find an instance of an independent agency rejecting the determination of the OMB director on this point.

The Director of OMB has the power to delegate authority to a senior agency official to manage that agency's information collection processes.⁸⁶ If a senior agency official is deemed by OMB to be "sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved," and has the resources to conduct those evaluations, the OMB director can make a revocable delegation via notice-and-comment rulemaking.⁸⁷ At present, OMB has delegated such power to two independent regulatory agencies: the Federal Reserve Board and the Federal Communications Commission (FCC).⁸⁸

The PRA defines information collection broadly. At its most basic, if an agency wants to ask identical questions of more than ten persons, it must receive clearance from OIRA.⁸⁹ "Persons" not only includes actual individuals, but also applies to legal persons, such as corporations, as well as state and local government entities.⁹⁰ The only category of person not included are "agencies, instrumentalities, or employees of the United States."⁹¹ The PRA, it must be emphasized, is concerned solely with external paperwork burden on the public and offers no relief for a federal bureaucrat who finds herself drowning in mandatory forms.

The PRA's broad definition of information collection goes beyond the mere asking of questions on a form or survey, preventing agencies from getting around its requirements through technicalities. Recordkeeping requirements and required disclosures to the public or third parties qualify as information collections.⁹² Agencies may not skirt PRA requirements by, for instance, directing contractors or grant recipients to collect information, or by partnering with a state agency.⁹³

The PRA provides some content-based exemptions to affected information collection activities. The statute exempts federal criminal investigations, civil actions, administrative actions or investigations against specific individuals, collections required by an antitrust statute, and collections for intelligence.⁹⁴ In 2016, Congress exempted Inspectors General investigations and reviews from PRA requirements.⁹⁵ During the Obama administration, OMB itself issued guidance that exempted a handful of activities from categorization as information collection un-

86. 44 U.S.C. § 3507(i); 5 C.F.R. 1320.16 (1997).

87. 44 U.S.C. § 3507(i).

88. 3 C.F.R. Pt. 1320 App. A (2008).

89. 44 U.S.C. § 3502(3) (2017).

90. 44 U.S.C. § 3502(10).

91. 44 U.S.C. § 3502(3)(A)(i)-(ii). This exception does not extend to "questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes."

92. 5 C.F.R. 1320.3(c) (2018).

93. *See* 5 C.F.R. § 1320.3(d).

94. 44 U.S.C. § 3518(c)(1) at 150 (2018). The exception for investigations does not apply to investigations targeting an industry or class. 44 U.S.C. § 3518(c)(2).

95. 5 U.S.C. app. 3 § 6(k) (2016).

der the PRA. OMB clarified that certain social media uses, interactive web tools, and general requests for comment were not covered by the PRA.⁹⁶

Importantly, the PRA does not ask whether the target of an information collection is compelled to respond.⁹⁷ An agency must comply with the PRA even if response to its information collection is totally voluntary.⁹⁸ The public policy rationale for scrutinizing compulsory information collection is quite clearly in line with the intent of the PRA. Extending that scrutiny to voluntary requests perhaps reflects an intent by Congress to limit the sort of soft power felt by regulated entities concerning requests from the federal government.⁹⁹ If an agency does not comply with the PRA for a given information collection, the most significant consequence is that the public may ignore the request without suffering any penalty that would ordinarily come from not complying with the information collection.¹⁰⁰ However, this applies only to that portion of information collections covered by the PRA that are compulsory for respondents.¹⁰¹ Information collections may face additional scrutiny if included as part of a rulemaking, although the analysis may not be as particular with regard to the form or information collection design.¹⁰²

The PRA also does not distinguish between information collection requests that are required by statute and those that are subject to agency discretion.¹⁰³ However, the criteria that OIRA uses to evaluate an information collection includes its purpose and necessity—meaning OIRA is not likely to deny a record-keeping requirement that is based on specific statutory language.¹⁰⁴ They could,

96. Memorandum from Cass Sunstein, Adm'r, Office of Info. & Reg. Affairs, White House Office of Mgmt. and Budget, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

97. See 44 U.S.C. § 3502(3) (2018).

98. See *id.* The definition of “information collection” in the statute makes no distinction between compulsory and voluntary collections.

99. Indeed, some have described a sense of obligation to respond to government surveys by individuals (separate from regulated entities) as a justification for applying PRA requirements to voluntary collections. See SHAPIRO, *supra* note 8, at 30 (describing a sense of obligation to respond to government surveys by individuals (separate from regulated entities) as justification for applying PRA requirements to voluntary collections).

100. 5 C.F.R. § 1320.6 (2019).

101. See *id.* If a survey is voluntary, the withholding of a penalty has no effect.

102. See Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); 3 C.F.R. §§ 638, 640 (2018). Rulemakings that impose record keeping requirements will not have the specificity of an OIRA PRA package (such as a specific instrument design, etc.), but will still need to pass OMB cost-benefit review generally.

103. See 44 U.S.C. § 3502(3) (2017).

104. See 44 U.S.C. § 3506 (2017).

however, still require changes to ensure that it is developed and implemented in a minimally burdensome way.¹⁰⁵

2. Agency Requirements for OMB Approval

To proceed with an information collection, an agency must meet a number of requirements. Suppose the Federal Highway Administration (FHWA), in support of a requirement imposed on it by Congress, wishes to survey state governments regarding their use of a particular definition of “serious injury” in traffic data.¹⁰⁶ The FHWA is a grantmaking agency that administers federal highway funds by distributing them to state governments.¹⁰⁷ As such, its program implementation (for instance, promoting safe highway design or tracking performance) regularly requires the collection of information from state governments, which are “persons” covered by the PRA’s definition of information collection.¹⁰⁸ To begin, FHWA must develop its request. Agency documentation must describe the desired information, evaluate the need for collection, provide a plan for collection and the management of collected information, evaluate whether electronic collection techniques could reduce the burden on respondents, and, if appropriate, develop a pilot test of the instrument.¹⁰⁹ FHWA must also provide a specific estimate of the burden, including the time, effort, and money spent by states to generate, maintain, and disclose the requested information.¹¹⁰ In this example, because it is a relatively simple survey, the burden is fairly straightforward: the time needed to assemble the data and to respond, and the estimated number of respondents.

FHWA will next submit its request to the Department of Transportation’s (DOT) Chief Information Officer (CIO).¹¹¹ The PRA requires agencies to designate a CIO to oversee agency information collection activities, including evaluating information collection requests and managing information resources.¹¹² The CIO may require alterations of the request from FHWA. Once revised and approved by the CIO, DOT must put out the proposed collection for a sixty-day no-

105. One could imagine this being used to slow the implementation of a recordkeeping requirement that an administration is ideologically opposed to. See *infra* Section III.C.4.

106. This describes an information collection proposed by FHWA on September 28, 2018, pending as of this writing with OIRA. See Inventory of State Compliance on Serious Injury Reporting Using the Model Minimum Uniform Crash Criteria 4th Ed., ICR Reference No. 201806-2125-002, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-2125-002 (last visited January 15, 2019) [hereinafter Inventory of State Compliance].

107. *Who We Are*, U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/about/> (last modified Apr. 1, 2019).

108. See, e.g., Inventory of State Compliance, *supra* note 106.

109. 44 U.S.C. § 3506(c)(1)(A) (2017); 5 C.F.R. § 1320.8(a) (2018).

110. 5 C.F.R. § 1320.8(a)(4), 1320.3(b)(1).

111. See 44 U.S.C. § 3506(c)(1).

112. *Id.*

tice and comment period in the Federal Register.¹¹³ Comments received must then be incorporated, which may involve more quibbling between the CIO and FHWA.¹¹⁴

Once settled, the DOT CIO must certify that its request meets several criteria laid out by the PRA and OMB regulations.¹¹⁵ The request must include answers to eighteen questions for nonstatistical collection requests and twenty-three questions for statistical collections.¹¹⁶ Then, the DOT CIO may submit its request to OMB, and also publish notice of its request for approval in the Federal Register, designating a thirty-day window for the public to submit comments to OMB.¹¹⁷ Within sixty days, provided that the thirty-day comment window has elapsed, the OMB director must either approve, make a substantive or material change, deny the request, or direct FHWA to make a substantive or material change.¹¹⁸ If approved, OMB will provide DOT and FHWA with a control number to attach to the collection, which may be valid for up to three years.¹¹⁹ If OMB fails to take action, the request is presumed approved and OMB must provide a control number that may be valid for up to one year.¹²⁰ If FHWA wishes to renew the information collection, it must go through the process again prior to expiration.¹²¹

Together, the development and approval of an information collection can take from six months up to a year depending on departmental and OMB practices.¹²² OIRA is generally regarded as short-staffed, having seen a reduction in headcount and budget as its responsibilities have grown along with the size of the administrative state.¹²³ OIRA is particularly rigorous in its review of survey methods and statistical research, often requiring additional rounds of instrument testing and high

113. 44 U.S.C. § 3506(c)(2); 5 C.F.R. § 1320.8(d)(1).

114. This quibbling is likely to be informed by the DOT's volume of requests. Because the CIO is responsible for ensuring that the Department as a whole is meeting its targets under the PRA, the CIO might dissuade certain information collections. At the very least, this step is another layer of review adding time to the schedule. 5 U.S.C. § 553(c) (2018) (requiring that an agency incorporate comments to a notice of proposed rulemaking).

115. 44 U.S.C. § 3506(c)(1)(A) (2017).

116. See Paperwork Reduction Act Submission, OMB Form 83-I, <https://www.usaid.gov/sites/default/files/documents/1868/OMB%2083-I%20%28Paperwork%20Reduction%20Act%20Submission%29.pdf> (last visited Oct. 31, 2019).

117. 5 C.F.R. § 1320.10(a) (2018).

118. 5 C.F.R. § 1320.10(b).

119. When relevant circumstances have changed or the burden estimates provided by the agency upon submission have changed, OMB may, at its discretion, review the information collection for burden prior to the expiration of the control number. 5 C.F.R. 1320.10(b), (f).

120. 5 C.F.R. § 1320.10(c).

121. 5 C.F.R. § 1320.10(e).

122. See SHAPIRO, *supra* note 8, at 26.

123. John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J. OF L. & PUB. POL'Y: FEDERALIST EDITION 30, 35-36 (2014).

response rates for approval (despite significant scrutiny for monetary incentives to support responses).¹²⁴ The overall effect for agencies is a lengthy process to collect information from the public.

OMB does have a process for emergency information collection. The agency must provide a written determination that such an exigency exists, at which point it can publish a notice in the Federal Register and petition OMB for a short-term approval for up to 90 days.¹²⁵ Given the length of this process, the Obama administration's OMB issued guidance to promote the use of "general clearances," which provide agencies with a means of obtaining quick approval for certain types of information collection.¹²⁶ Fast-track requests generally apply to the collection of customer feedback, such as visitor or website surveys and require an OMB response within five business days.¹²⁷

B. *Effectiveness of the Paperwork Reduction Act*

Has the PRA been successful at *reducing* the federal paperwork burden on the public? Generally speaking, no.¹²⁸ While reasons for the ever-increasing paperwork burden are multi-faceted, the fact remains that the total paperwork burden driven by the federal government has increased from 6.97 billion to 9.78 billion hours since 1997.¹²⁹ That isn't to say that the PRA is completely ineffective at reducing burden. The PRA has almost certainly dissuaded agencies from pursuing some information collections.¹³⁰ The high cost of pursuing public information collection necessarily means that some will be forgone, and one can assume that at least a portion of these forgone surveys would not have been cost-beneficial. Presumably, the renewal process encourages some agencies to streamline their information collections or adopt electronic means of collection. Admittedly, it is impossible to judge the role the PRA process plays in this sort of modernization. However as Professor Funk noted in 1987, the benefit from identifying duplicative information collections is not likely to result in savings that drastically reduce the cost of pa-

124. See SHAPIRO, *supra* note 8, at 13-14; Memorandum from John D. Graham, Adm'r, Executive Office of the President, White House Office of Mgmt. and Budget, Guidance on Agency Survey and Statistical Information Collections, 69 (Jan. 20, 2006), https://www.cio.noaa.gov/itmanagement/pdfs/OMBSurveyGuidance_0106.pdf.

125. 5 C.F.R. § 1320.13(a), (d), (f).

126. Memorandum from Howard Shelanski, Adm'r, Office of Info. & Reg. Affairs, White House Office of Mgmt. and Budget, Flexibilities under the Paperwork Reduction Act for Compliance with Information Collection Requirements, 1 (July 22, 2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/infoereg/praflexibilities_memo_7_22_16_finalI.pdf.

127. See *id.*

128. Stuart Shapiro, *The Paperwork Reduction Act: Benefits, Costs and Directions for Reform*, 30 GOV'T INFO. Q. 204, 206 (2013).

129. *Id.*; OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, *supra* note 6, at 2.

130. See SHAPIRO, *supra* note 8, at 27.

perwork for the public.¹³¹ Simply put, there isn't enough duplicative data collection between federal agencies for this streamline to result in massive new burden savings. Certainly by 2018, one imagines that most of these easy savings have been identified.

Perhaps the PRA is effective in improving the quality of information collection. The PRA provides the public with the opportunity to comment on proposed information collection activities, with some exceptions.¹³² Public participation, or at least the knowledge of its requirement, could improve information collection. But while one study found that in a two month period, sixty-three percent of regulations put forward for notice and comment received public comments,¹³³ a 2005 Government Accountability Office (GAO) report estimated that only around seven percent of information collection activities receive public comments.¹³⁴ Comments tend to be concentrated around a few requests that are high-cost or connected to contentious rulemakings.¹³⁵ This could be the fault of ineffectual outreach by agencies or OMB; the GAO report recommended that more be done.¹³⁶ In the case of notice-and-comment rulemaking, studies have found that with few exceptions, comments are dominated by regulated industry, reflecting the public choice theory maxim that the costs of rulemaking are concentrated and the benefits diffuse.¹³⁷ This is, if anything, more likely to be the case for many information collections. As it stands, the limited public participation that does occur could improve those collections, but it is unclear whether this benefit is worth the delay.

OMB (and CIO) scrutiny and involvement might also improve information collection. OIRA corrects simple mistakes made by agencies and can encourage a set of government-wide best practices.¹³⁸ Not all agencies have expertise in statistical or survey methods, and encouraging review might improve quality control.¹³⁹

131. See Funk, *supra* note 13, at 111.

132. 44 U.S.C. § 3506(c)(2) (2017).

133. Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J. OF L. & POL'Y 393, 404 (2007).

134. GOV'T ACCOUNTABILITY OFFICE, GAO-05-424, PAPERWORK REDUCTION ACT: REDUCING BURDEN MAY REQUIRE A NEW APPROACH 24 (2005), <https://www.gao.gov/assets/250/246399.pdf>.

135. SHAPIRO, *supra* note 8, at 15.

136. See GOV'T ACCOUNTABILITY OFFICE, GAO-05-424, *supra* note 134, at 5-6 (2005).

137. See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 105-08 (2011). In a recent example of this phenomenon, the Securities and Exchange Commission chairman announced a new rule and cited letters from 'Main Street investors'—letters that were in fact written as part of a public relations campaign from industry. Zachary Midler & Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG (Nov. 19, 2019), <https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change>.

138. See SHAPIRO, *supra* note 8, at 13.

139. Shapiro, *supra* note 128, at 207.

However, many agencies do have scientists trained in these fields.¹⁴⁰ At agencies with regular experience running statistical surveys, their scientists and practitioners might have a better understanding of the constraints and techniques that make sense in their area than OMB desk officers. One study that interviewed federal experts on PRA effectiveness found that agencies with statistical expertise chafed at what they felt to be outdated statistical standards used by OIRA.¹⁴¹ Delay caused by justification and quibbling with OMB will be pure social cost in some contexts.

Finally, the PRA requires calculation of public burden. These data force agencies to consider the costs of information collection and can guide information management policies at agencies to manage their resources at a more socially optimal level. Agencies must design their survey instruments with the public burden in mind. On occasion, an agency might forgo a collection when confronted by the public burden it would generate in comparison to its usefulness to the agency (and by extension, to the public).

This story would be more compelling were it clearer that the burden estimates agencies generate for information collections were accurate. Some scholars have criticized the methodologies used to calculate burden estimates as insufficiently accurate or realistic.¹⁴² The GAO has raised concerns about the rigor and usefulness of the estimates generated for OMB review.¹⁴³ There is little in the way of process to test the accuracy of burden estimates if and when an information collection is reviewed.

The failure of the PRA to meaningfully reduce the public burden of information collection certainly is disappointing from the standpoint of reducing paperwork, albeit understandable given the quantity of statutorily-driven paperwork mandates. But the costs generated by the PRA process are also significant.¹⁴⁴

C. *The Burden of the Paperwork Reduction Act on Agencies and the Public*

As is clear from the discussion of the operation of the PRA, getting approval for an information collection is difficult. At best, it takes a great deal of schedule time. Not merely an administrative burden, there are societal costs associated with the PRA regime. These come in the form of the literal costs faced by agencies to comply with the PRA, the delayed benefits from regulations and other agency actions, and the loss of forgone useful information collections.

140. See SHAPIRO, *supra* note 8, at 13-14.

141. *Id.*

142. See, e.g., Samaha, *supra* note 32; SHAPIRO, *supra* note 8, at 21-22.

143. See GOV'T ACCOUNTABILITY OFFICE, GAO-05-424, *supra* note 134, at 19-21.

144. See discussion *infra* Section II.C.

1. Direct Costs

The direct costs of the PRA are straightforward. Agencies face direct costs from the labor associated with preparing the paperwork required to receive OMB approval, and OMB itself bears the cost of evaluating requests from agencies. These costs should not be minimized. The labor burden associated with this additional administrative work either requires additional staff or simply pulls employees away from their main work. Information collections must be resubmitted every three years and require two public comment periods.¹⁴⁵ A significant amount of administrative overhead is required to meet and implement these requirements. This costs taxpayers money and diverts attention from directly delivering the programs and regulations that the agency is substantively intended to provide.

2. Costs from Delay

The indirect costs associated with delay may be even greater than direct costs. Agencies want to collect information for a reason. As discussed above, these reasons are myriad: support rulemaking, understand the effectiveness of government programs, and improve the delivery of government programs.¹⁴⁶

Delayed collections mean delayed agency action. At a regulatory agency, this can mean a delay of a societally beneficial rule and a resulting loss of benefits. An agency might need the results of a study to justify a proposed rule to OMB or the courts. Assuming that enacted regulations have survived a cost-benefit analysis, the costs of delay may take the form of injuries, illnesses, or lost lives.¹⁴⁷

Delayed information collections also affect the government's ability to deliver or improve services. Clearly, such delay reduces agency effectiveness, and the public therefore either incurs costs from waste or forgoes benefit from optimized services. Streamlined data collection would better inform a variety of agency decisions, including not only where to develop new regulations, but also what programs or regulations could be cut back.¹⁴⁸ In short, delayed information collection can blunt agency effectiveness.

Finally, information collections can be beneficial simply through their usefulness to the public. Consider the wide variety of data the federal government makes

145. See discussion *supra* Section II.A.2.

146. See discussion *supra* Section I.B.

147. See, e.g., Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 78 Fed. Reg. 70416, 70468 (2013) (providing an analysis of benefits from lives saved from a new airbag rule).

148. Although there is no doubt that an earnest believer in lean government would appreciate rigorous procedure for information collections, she should be concerned that such procedure carries with it the possibility that delayed information collection can allow ineffective or actively costly government programs to run longer than they might otherwise.

available to the public that comes in via survey or reporting requirements.¹⁴⁹ These surveys can be useful for academic purposes or for the broader public. In some cases, the public availability of data provides a nudge to reporting industry to improve its behavior, or provides the body politic with the information needed to agitate for necessary lawmaking.¹⁵⁰ If these collections are delayed, so are their benefits.

3. Costs From Forgone Information Collection

Similarly, forgone information collections are costly. Just as with OIRA review of regulations, review of information collections is biased in the negative: OIRA does not review agency inaction.¹⁵¹ To many, paperwork is a more obvious unmitigated bad than regulation.¹⁵² But to the extent that worthy or cost-beneficial collections are forgone because of the PRA, the Act imposes costs on the public.

One can assume that information collections rejected by OMB are, indeed, unworthy. But the costs to an agency in putting forward an information collection, in terms of schedule delay and pure hassle, cause agencies to forgo information collections that might otherwise provide useful benefits.¹⁵³ These collections are not likely to be the sort of burdensome, mandatory reporting requirements considered by those who think of government paperwork, but the sort of voluntary surveys that can improve agency decision-making and program offerings.¹⁵⁴ It simply may not be worth the time for a group of bureaucrats, even those at a research-focused agency, to spend a year of their time seeking OMB review for a study.

It is also worth considering what replaces formal information collection when the PRA causes an agency to abandon that approach. After all, the need for data doesn't disappear. The definition of information collection encourages agencies to limit their collections to nine or fewer interviews to avoid PRA requirements.¹⁵⁵

149. See, e.g., Employment Situation, BUREAU OF LAB. STAT. (2019), <https://www.bls.gov/news.release/empstat.toc.htm> (report released monthly by the Bureau of Labor Statistics, which includes the estimated unemployment rate and is sourced from two surveys of the public).

150. For an example of data reporting that has affected the supplying industry, see, e.g., The College Scorecard, U.S. DEP'T OF EDUC., <https://collegescorecard.ed.gov/> (last visited Jan. 10, 2020).

151. The review process for information collections is, as with regulatory review, purely a negative check; a review of action only. See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. J. 1337, 1377-79 (2013) (discussing the limited capacity of OMB review to overcome capture induced agency inaction in rulemaking).

152. Paperwork is a deadweight loss, while regulation is presumably cost-beneficial. See discussion *supra* Section II.A. See also Thaler, *supra* note 22.

153. See SHAPIRO, *supra* note 8, at 27-28 (recounting interviews with federal officials describing forgone surveys and other research because of PRA delay and burden).

154. Congressionally mandated information collections will be higher priorities for agencies and have an easier time meeting OIRA review (as their justification is clear), while agencies are more likely to decide that the burden of justifying a voluntary survey (and the accompanying schedule delay) is not worth pursuing.

155. See SHAPIRO, *supra* note 8, at 27-28.

Such anecdotal data collection undoubtedly has the effect of limiting the usefulness and the accuracy of such studies.¹⁵⁶ Agencies might also find themselves having to turn to regulated industry for data and information, the sort of behavior that raises popular concerns of agency capture.¹⁵⁷

Forgoing collection itself can make rulemaking challenging. Rulemaking requires data to fine-tune requirements and to support required cost-benefit analyses. In particular, the benefits of regulations can be particularly difficult to value.¹⁵⁸ Hard-look review demands robust data to support rulemaking; and in an era of rigorous cost-benefit analysis, good data is needed to get rules approved within the Executive Branch as well.¹⁵⁹ Forgoing data collection has the effect of undermining the functioning of agencies, their programming delivery, and the types of beneficial regulations they can propose and issue.

4. The PRA as a Political Tool

Finally, although a centralized information collection hub at OMB provides some benefits, it also comes with costs inherent to OMB's position within the White House. Much has been written about the effects of increased White House influence on the regulatory process via OMB from both sunny¹⁶⁰ and dim¹⁶¹ views. While paperwork is a much less alluring target than regulation, information collection can also be subject to political manipulation.

In 2016, the Equal Employment Opportunity Commission (EEOC) initiated a reporting requirement imposed on employers with more than 100 employees to submit data regarding gender pay equity—a goal in line with the political priorities of the Obama administration.¹⁶² The collection was approved by OMB in September of 2016.¹⁶³ In 2017, the Trump administration's OIRA Administrator initiated a review of the data collection and stayed the requirement, effectively excusing tar-

156. A general principle of survey and qualitative research is that a larger sample reduces the error associated with sampling. See ROGER SAPSFORD, *SURVEY RESEARCH* 90-91 (2d ed. 2007).

157. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (describing the theory of agency capture).

158. See e.g., Lisa Heinzerling, *Inside EPA: A Former Insider's Reflection on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 352-53 (2014) (speculating about how the difficulty of conducting cost-benefit analyses on regulations contributes to trouble in advancing environmental regulations).

159. See *id.*

160. See, e.g., Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

161. See, e.g., Heinzerling, *supra* note 158 (responding to Sunstein, *supra* note 160).

162. Bernard Bell, "Equal Pay for Equal Work" & Overturning Close to "Midnight" Actions, 36 YALE J. REG.: NOTICE & COMMENT (Mar. 10, 2019), <http://yalejreg.com/nc/equal-pay-for-equal-work-overturning-close-to-midnight-actions/>.

163. *Id.*

geted employers from having to comply with the reporting requirement.¹⁶⁴ A district court later reversed OIRA's action as a violation of the APA, allowing the reporting requirement to go back into effect.¹⁶⁵ OIRA had attempted to justify its review on procedural deficiencies in the EEOC's information collection request.¹⁶⁶ It isn't hard to see this in a political light, however. An administration opposed to an independent agency's interpretation of its mission used the tools of the PRA to stop an information collection to which it was presumably ideologically opposed. Perhaps such interference is simply the exercise of a President's prerogative to control the actions of executive agencies. But to the extent that agency action is to be based on reasoned, scientific judgment rather than political caprice,¹⁶⁷ this use of the PRA is concerning.

For some, reducing agency effectiveness might be a feature, not a bug. For those ideologically opposed to the administrative state, slowing its operations might itself be a social good.¹⁶⁸ This is not to say that the intent behind the PRA was to add useless procedure to slow the operations of the administrative state. As discussed above, the available evidence suggests that the PRA was a well-intentioned attempt at reducing the paperwork burden the public faces.¹⁶⁹ However, today there is widespread popular hostility to the administrative state that embraces additional and unnecessary proceduralism as a tool to slow what it perceives as harmful government action.¹⁷⁰ For those who do believe that the administrative state delivers more good than bad, however, the burden the PRA places on agencies appears likely to outweigh its benefits.

164. Memorandum from Neomi Rao, Admin., Office of Info. & Regulatory Affairs, to Victoria Lipnic, Acting Chair, Equal Emp't Opportunity Comm'n (Aug. 29, 2017).

165. Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, 358 F. Supp. 3d 66 (D.D.C. 2019).

166. Rao, *supra* note 164.

167. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (opining that agency actions should be informed by reasoned judgment rather than political gain).

168. There have been, for instance, a number of bills introduced by Congressional conservatives seeking to introduce significant procedure to prevent the adoption of significant rules. *See, e.g.*, Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) (proposing the reintroduction of formal rulemaking, which passed the House in the 115th Congress). For further discussion of the Regulatory Accountability Act, *see generally* William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, THE REG. REV., May 18, 2017, <https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/>; *see also* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019), available at SSRN: <https://ssrn.com/abstract=3347377> or <http://dx.doi.org/10.2139/ssrn.3347377>.

169. *See* discussion *supra* Section II.C.

170. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019) (manuscript at 5-6), available at SSRN: <https://ssrn.com/abstract=3347377> or <http://dx.doi.org/10.2139/ssrn.3347377>.

III. PROPOSALS FOR REFORM

Two things are true: the PRA has been largely unsuccessful at reducing the paperwork burden agencies impose on the public, and largely successful at increasing the paperwork burden within agencies. Regardless of which of these one finds a more pressing concern, some reform is needed.

I propose largely eliminating the PRA. As evidenced, it has succeeded only in handicapping the effective administration of government with relatively little to show for it. When considered in light of the current state of administrative law, the PRA fits into the category of procedure that might appeal on the surface, but merely inhibits agency action to the ultimate detriment of the public good. This Part begins with an overview of previous proposals for reform of the PRA, before expanding on the proposal to largely eliminate the Act.

A. *Prior Proposals for Reform*

There is relatively little scholarship on reforms to the PRA, but what has been proposed comes from two camps. First, there are those who believe the PRA is a toothless piece of legislation that needs more aggressive enforcement, including judicial review, to reduce the burden on the public.¹⁷¹ Second, there are those who agree that the PRA interferes unnecessarily with agency functioning and thus needs to be adapted to reduce the burden on agencies.¹⁷² I address these existing proposals below in turn.

1. Arguments for Modifying the PRA Regime to Add Enforcement

A few academic proposals express concern that the PRA has been largely ineffective at reducing paperwork burden due to poor enforcement. By encouraging more robust review by OMB and the judiciary, they argue that the ends of the PRA might be more effectively achieved. There is more than a little truth to the notion that the PRA lacks teeth. Violations of the PRA have been historically commonplace, peaking at 800 in 1999 before dropping significantly in the 2000s—rising again to 283 in 2016.¹⁷³ Such violations are typically not punished with more than a stern letter from the OMB director. Interestingly, OMB itself appears out of compliance with the PRA. As of this writing, the agency has not published its

171. See, e.g., Andrew L. Levy, Comment, *The Paperwork Reduction Act of 1980: Unnecessary Burdens and Unrealized Efficiency*, 14 J. L. & COM. 99, 120-21 (1994).

172. See, e.g., SHAPIRO, *supra* note 8.

173. OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, FISCAL YEAR 1999 INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT, at 269-305, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/icb-fy99.pdf>; OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, 2016 INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT, 9, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/icb/icb_2016.pdf.

statutorily mandated Information Collection Budget document since the 2016 fiscal year.¹⁷⁴ At a minimum, this delay could reflect the significant workload placed on OIRA.

One proposal is for more robust judicial review of the PRA.¹⁷⁵ One form this can take, as exemplified in the EEOC pay equity collection discussed earlier, is through increased use of the APA to review OIRA action.¹⁷⁶ APA review of actions taken under the PRA rarely occurs today.¹⁷⁷ Other means include more robust enforcement of the public protection clause discussed earlier, which exempts the public from penalties associated with noncompliant information collections.¹⁷⁸ One proposal is an exclusionary rule of sorts for the protection clause, where any information collected through noncompliant collections would be suppressed for use in enforcement proceedings.¹⁷⁹ Although this might have the effect of incentivizing agencies in narrow circumstances to better comply with the strictures of the PRA, courts have rejected such a theory because the clause is intended to protect the public, not disincentivize agency action.¹⁸⁰

Another proposal, put forward by Professor Sunstein, would have Congress amend the PRA to allow legal challenges to “arbitrary or capricious” approvals by OIRA.¹⁸¹ This would allow individuals to use the APA to challenge actions by government officials that are arbitrary or capricious in federal court.¹⁸² Professor Sunstein envisions judicial review as a vehicle for ensuring that agencies act in compliance with the law and with the PRA, which he characterizes as creating “burden . . . that has not been minimized and has little practical utility.”¹⁸³

In other contexts, this judicial review has provided an important vehicle for regulated parties to ensure that executive actions are in line with their enabling statutes. But robust, “hard-look” judicial review has also led to concerns of agency ossification, where agencies are overly cautious because of the near-guaranteed legal challenges to rules that are not supported by the communities they seek to reg-

174. Author’s review of the Office of Management and Budget website. Despite data calls for the Fiscal Year 2017 and 2018 Information Collection Budgets, FY2016 is the most recent report available, perhaps reflecting the limited staff resources of OIRA for reviewing information collection requests.

175. See Levy, *supra* note 171, at 118-19 (1994).

176. See *id.*

177. See Bell, *supra* note 162, at n.14 (“In the D.C. Circuit, there appear to be only three cases since 1995 that challenge OMB’s actions or inaction under the Paperwork Reduction Act” (1) *United to Protect Democracy v. Presidential Advisory Comm. on Election Integrity*, 288 F. Supp. 3d 99 (D.D.C. 2017); (2) *Tozzi v. EPA*, 148 F. Supp. 2d 35 (D.D.C. 2001); (3) *Public Citizen v. Lew*, 127 F. Supp.2d 1 (D.D.C. 2000”).

178. 44 U.S.C. § 3512 (2012). See discussion *supra* Section II.A.

179. See Levy, *supra* note 171, at 116.

180. *United States v. Takeo Matsumoto*, 756 F. Supp. 1361, 1365 (D. Haw. 1991).

181. Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L. J. 1843, 1879 (2019).

182. 5 U.S.C. § 706 (2)(b) (2017).

183. Sunstein, *supra* note 181, at 1878.

ulate.¹⁸⁴ One can imagine that agencies and an OIRA facing the prospect of such particularized judicial review would be significantly more cautious in approving new surveys or information collection efforts, particularly where an information collection would affect a well-heeled regulated industry. For statutorily mandated collections, especially those that generate significant burdens like the FAFSA or tax returns, such review might generate worthy benefits, as Professor Sunstein envisions.¹⁸⁵ But these proposals would almost certainly increase the costs from delay and forgone actions associated with the PRA, not to mention the significant litigation costs and burdens this would generate.¹⁸⁶

Professor Sunstein recommends additional amendments to the PRA that would change the extent of OIRA review.¹⁸⁷ Among others, Professor Sunstein proposes requiring that the benefits of paperwork justify its costs, and that agencies be explicitly required to choose the most cost-effective means of achieving their information collection needs.¹⁸⁸

Such changes are, on their face, sensible. Agencies should design their information collections with a healthy sense of economy and seek to continually improve them to reduce the costs and burdens they place on the public. But in the case of information collection, a strict cost-benefit review does not make sense. It is difficult enough to monetize the intangible benefits of some environmental regulations;¹⁸⁹ the benefits of information collections are likely to be much more difficult to quantify. Professor Sunstein, recognizing this, characterizes such an examination as one of balancing the purposes of information collection and the costs imposed on the public.¹⁹⁰ But even with that abstraction, the increased burden of justifying each proposed information collection would certainly lead to forgone

184. See Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L. J. 1385, 1391 (1992). For general discussion on the extent and causes of agency ossification, see JERRY L. MASHAW ET. AL., *ADMIN. L.*, 783-96 (7th ed. 2014).

185. See Sunstein, *supra* note 181, at 1878.

186. This impact could have a particular valence. Suppose an agency seeks to survey an industry to glean information that could be used at a later date to support rulemaking that the industry opposes. That regulated industry would have essentially two opportunities to challenge that action legally. The prospect of such challenge might very well further the extent of ossification, where agencies daunted by the effort required to sustain their actions in the court forgo not only the regulation but also their research and data gathering functions. See McGarity, *supra* note 184, at 1391; Mashaw et. al., *supra* at 783-96.

187. See Sunstein, *supra* note 181, at 1879-81.

188. *Id.* at 1879-80.

189. See discussion *supra* accompanying note 158.

190. See Sunstein, *supra* note 181, at 1881. One of the faults of cost-benefit analysis is the challenge associated with properly estimating benefits that are difficult to quantify. Without further research (sometimes the sort that requires OIRA clearance under OIRA) to provide mechanisms to measure benefits, the cost-benefit analysis can disincentivize the pursuit of actions that have less measurable benefits. One could easily imagine this encompassing information collection.

surveys and generalized delays in new collections, increasing the paperwork burden internally and disincentivizing government action.

Professor Sunstein's proposals fall into the trap of "proceduralism" described by Professor Nicholas Bagley.¹⁹¹ Professor Sunstein argues for these improvements as a way to increase the effectiveness of government programs by decreasing the administrative hurdles to participation.¹⁹² His means at achieving these worthy goals, however, involve massively increasing the procedural burden agencies face when they try to act. This fits Professor Bagley's description of "proceduralism" on the political left: those supportive of government action broadly, who agree with increasing administrative procedure as a means of protecting against abuses of power by Executive Branch bureaucrats.¹⁹³

Professor Bagley argues that those on the left who are supportive of such increased procedure both underestimate the costs associated with that procedure and the extent to which procedure is used by the right as an explicit tool of limiting the administrative state.¹⁹⁴ First, conservatives who oppose the functioning of the administrative state have proposed legislation that would provide drastically increased procedural hurdles for agencies with the explicit goal of making it harder for agencies to enact their statutory missions.¹⁹⁵ But even procedure that lacks such an explicit ideological valence (such as the PRA) has that very effect, making it harder for the administrative state to enact rules and take action to protect the public's safety and wellbeing.¹⁹⁶ Although well-meaning, requiring strict judicial review and enhanced cost-benefit analysis would serve to drastically increase the procedure required for information collection in ways that would be detrimental to the functioning of government and to the public good.

2. Arguments for Modifying the PRA Regime to Reduce the Burden on Agency Functioning

The most comprehensive recent examinations of the Paperwork Reduction Act are a series of papers by Professor Stuart Shapiro. Professor Shapiro was hired by the Administrative Conference of the United States (ACUS) to understand the effect of the PRA.¹⁹⁷ His report was released in two stages: a first draft that in-

191. See generally Bagley, *supra* note 170, at 3.

192. See Sunstein, *supra* note 181, at 1850-51. His example of voter registration is one of wholly unnecessary administrative burden placed on the public, albeit one largely outside the control of the federal government (and by extension, the PRA).

193. See Bagley, *supra* note 170, at 4-5.

194. See generally *id.*

195. See discussion *supra* at note 168.

196. See discussion *supra* at Section II.C.

197. SHAPIRO, *supra* note 8.

cluded proposals for Congressional change,¹⁹⁸ and a final report focusing on administrative changes.¹⁹⁹ The second report led to a set of proposed administrative recommendations directed at OIRA to improve the speed and effectiveness with which it can process information collection requests.²⁰⁰ This includes: the increased use of expedited clearance procedures, such as the use of generic clearances and fast track procedures adopted by the Obama administration OIRA; improved training and distribution of information from OIRA to agencies on how to submit information requests; refining the required supporting statement agencies must submit with a proposed information collection; and improving the computer system used to submit and track information collection requests.²⁰¹ All are worthwhile suggestions that could reduce the costs associated with delay and forgone information requests. However, in large part because these proposals operate within the structure of the current statute, they are in total, small improvements that would have only a minor impact on the identified costs of the PRA.

Professor Shapiro's original suggestions for statutory change would provide greater benefit by reducing bureaucracy. He advocated for amending the PRA to increase the time between renewals from three to five years.²⁰² This would significantly decrease the annual load for both agencies and OIRA and would do so for a category of approvals that, in his view, sees little improvement from the PRA process.²⁰³ His second proposal, echoing a prior GAO recommendation,²⁰⁴ was to eliminate the initial sixty-day comment period before an agency submits an information collection request to OMB.²⁰⁵ He argues that the later thirty-day comment period serves the same purpose, and that significant delay and little benefit occurs from a second bite at the apple for commenters.²⁰⁶ Finally, he proposes altering the statutory requirements for the Information Collection Budget report to Congress, specifically eliminating the annual request for information from agencies themselves.²⁰⁷ He notes that this information is generally available on OIRA's webpage on information requests (reginfo.gov), that the report as published is not useful to

198. *Id.*

199. STUART SHAPIRO, PAPERWORK REDUCTION ACT EFFICIENCIES, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (May 14, 2018), <https://www.acus.gov/sites/default/files/documents/paperwork-reduction-act-efficiencies-final-report.pdf>.

200. ADMIN. CONFERENCE OF THE U.S., PAPERWORK REDUCTION ACT EFFICIENCIES PROPOSED RECOMMENDATION (June 14, 2018), <https://www.acus.gov/sites/default/files/documents/paperwork-reduction-act-efficiencies-recommendation-for-plenary.pdf>.

201. *Id.*

202. SHAPIRO, *supra* note 8, at 39.

203. *Id.* at 38-39 (Professor Shapiro assumes that most benefits of OIRA review come from new, rather than renewed, information collection requests.).

204. *Id.* at 42.

205. *Id.* at 40-41.

206. *Id.*

207. *Id.* at 42-44.

the general public or OMB, and that it serves as unnecessary paperwork for agencies and OIRA alike.²⁰⁸ These proposals are, as with the administrative changes, all worthy. All would serve to reduce some of the burden and public cost generated by the PRA. Yet all generated controversy at the related ACUS committee meeting such that they were not formally adopted.²⁰⁹ But even these proposals are all marginal changes that would still result in forgone information collection and significant delay.

B. *Eliminating the Paperwork Reduction Act*

As outlined, the PRA generates relatively few benefits. To be fair, it offers the potential for improvement in the rigor of new and existing information collections, encourages the collection of data on paperwork burdens, and forces agencies to forgo some information collections that are undoubtedly not cost beneficial. But the net benefit of these attributes is minimal, and it has not succeeded in a meaningful way at its namesake goal—reducing paperwork. At the same time, it generates a significant amount of paperwork for agencies. Agencies face processing times ranging from six months to a year for developing information collection requests from duplicative and underutilized commenting processes and a severely understaffed OIRA.²¹⁰ Despite the PRA's intent to eliminate and streamline mandatory reporting, such collections include voluntary surveys and other data collections that are unlikely to impose a significant burden on industry or the public.²¹¹

I propose eliminating the bulk of the PRA. Specifically, information collection requests should no longer need to be submitted to OIRA for review.²¹² Agencies should still retain internal functions to oversee paperwork burdens, but the OIRA approval processes and notice-and-comment procedures would be eliminated.

This repeal would have a number of benefits. First and most obviously, agencies would more easily be able to collect data. This would be particularly beneficial for voluntary collections. Agencies would be able to pursue statistical surveys and other forms of research to support rulemaking and program evaluation simply and easily. They would be able to respond to changing conditions or emergencies more simply. This would lead to more accurate and well-supported rulemaking and would streamline program delivery and efficiency.

208. *Id.*

209. Shapiro, *supra* note 199, at 30. Professor Shapiro is not explicit about what the controversy was regarding. One could imagine a) disagreement at what appropriate statutory revisions should be, b) disagreement regarding the propriety of offering statutory recommendations, or c) a reluctance to offer suggestions that might "weaken" the PRA.

210. See discussion *supra* at notes 8-10.

211. See discussion *supra* at Section II.A.1.

212. Of course, the PRA created OIRA, and so OIRA's statutory mandate would need to be preserved to include its primary modern and largely non-statutory function: the review of agency action under Exec. Order 12866.

Such a change would also free up resources. OIRA would be able to prioritize rulemaking review, speeding the process of promulgating societally beneficial rules (and removing rules that are no longer cost-beneficial). Agencies would be able to move resources currently devoted to the administrative burden of PRA review to other types of knowledge management functions and work directly related to their mandates. Eliminating these direct costs would have significant benefit across the federal government.

To be sure, some of the benefits of the PRA would be lost. Mandatory reporting requirements would be easier to implement, which would come at a cost to regulated entities. However, such requirements are often subject to a form of OIRA review as rulemakings already, minimizing the change.²¹³ Further, such a change would recognize the fact that most mandatory reporting requirements are driven by statute and Congressional interest. Take the example of industry lobbying around tax returns.²¹⁴ Ultimately, many of the drivers of paperwork burden are out of the hands of agencies; eliminating the burden of PRA requirements would acknowledge this.

Some of the initial benefits of the PRA, such as the elimination of duplicative collections, may be lost. This could be mitigated by encouraging agencies to maintain an internal review of mandatory paperwork burdens and periodically conduct reviews of burden. But even without this, eliminating the PRA would not change the political unpopularity of mandatory information collection. Administrations have long decried paperwork associated with the administrative state;²¹⁵ agencies would still have to contend with substantial political pressure to reduce the burden associated with information collection even without a PRA review process.

The public would lose its constructive ability to comment on proposed information collections. But as discussed above, such commenting is rarely utilized. Like agency notice-and-comment, it is not unreasonable to assume that the majority of commenting parties are regulated entities.²¹⁶ Such organizations cannot be said to lack the sort of political influence to seek statutory changes on the mandates that generate reporting requirements in the first place, or pressure administrations to reduce burdens they dislike.

Finally, without OMB review, the rigor of information collection may suffer slightly. The extent to which OMB review improves the quality of information collections is contested.²¹⁷ But certainly, in marginal cases, there may be a decline in quality. However, agencies collect information for a reason. They have intrinsic incentives to make sure such collection is accurate and well-supported, and many surveys are put forward by trained statisticians and other professionals across the

213. See discussion *supra* at Section II.A.1.

214. See discussion *supra* at Section I.A.

215. See discussion *supra* at Section I.C.

216. See *supra* note 134.

217. See SHAPIRO, *supra* note 8, at 31.

federal government. Eliminating the current overlay of OMB review is unlikely to substantially affect the quality of government statistical research.

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Eliminating the PRA would broadly increase the efficiency of the federal government. It would enable agencies to collect the information they need to properly fulfill their statutory mandates. On its face, the PRA might appear to be the sort of sensible procedure that protects the public from inept government requirements that would otherwise burden the public. In fact, it does little but hobble the functioning of agencies pursuing worthy goals. The current regime of ineffectively regulating paperwork with ever more paperwork should end.